

ARTICLE 41

Table of Contents

	<u>Paragraphs</u>
Text of Article 41	
Introductory Note	1
I. General Survey	2
II. Analytical Summary of Practice	3 - 16
A. The question whether the Security Council could take action under Article 41 without first making a determination under Article 39	3 - 6
B. The question of recourse to measures specifically under Article 41 to secure compliance with decisions of the Security Council	7 - 16

TEXT OF ARTICLE 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

INTRODUCTORY NOTE

1. This study consists of a brief survey of proceedings in the Security Council relating to certain proposals in connexion with which Article 41 was the subject of constitutional discussion. ^{1/} Draft resolutions invoking Article 41 appear to have given rise to two principal questions: first, whether the Security Council can invoke and take action under Article 41 without first making a determination under Article 39 of "the existence of any threat to the peace, breach of the peace, or act of aggression"; and, second, the question of recourse to measures, specifically under Article 41, to secure compliance with the decisions of the Security Council.

I. GENERAL SURVEY

2. During the period covered by this Repertory, there was only one occasion when a proposal ^{2/} in connexion with the Palestine question which specifically invoked Article 41 was submitted to the Council and was voted upon. However, an amendment ^{3/} to the paragraph of the proposal which contained the reference to Article 41 was put to the vote and adopted; as a result, the paragraph, as amended, was not put to the vote. On another occasion, the Security Council rejected, by 7 votes to 4, a draft resolution ^{4/} in connexion with the Spanish question calling upon all Members of the United Nations to sever diplomatic relations -- one of the measures authorized by Article 41 -- with the Franco Government of Spain.

^{1/} The scope of the provisions of Article 41 has on occasion been the subject of constitutional discussion in the proceedings of the General Assembly, particularly in connexion with the meaning of the term "action" as used in Article 11 (2) and with the question of the extent of the competence and powers of the General Assembly with regard to questions "on which action is necessary" (see also in this Repertory under Article 11). In the debates in the First Committee of the General Assembly in connexion with the reports of the Collective Measures Committee (G A (VI), Suppl. No. 13 (A/1891), and G A (VII), Suppl. No. 17 (A/2215)), considered under the agenda item "Methods which might be used to maintain and strengthen international peace and security in accordance with the Purposes and Principles of the Charter", references to Article 41 were made by a number of representatives. For example, see G A (VI), 1st Com., 476th mtg., para. 29; 477th mtg., para. 31; 479th mtg., para. 23; G A (VII), 1st Com., 574th mtg., para. 25; 575th mtg., para. 14.

^{2/} S C, 3rd yr., Suppl. for Oct., p. 72, S/1059/Rev.2.

^{3/} S C, 3rd yr., No. 124, 376th mtg., pp. 3 and 4; 377th mtg., p. 42.

^{4/} S C, 1st yr., 1st Series, No. 2, 48th mtg., pp. 383, 384 and 388.

II. ANALYTICAL SUMMARY OF PRACTICE

A. The question whether the Security Council could take action under Article 41 without first making a determination under Article 39 5/

3. The relationship between Articles 39 and 41 is stated in the text of Article 39. Questions regarding the nature of this relationship arose at the 34th meeting of the Security Council on 17 April 1946, during the discussion of a draft resolution 6/ submitted by Poland on the Spanish question.

The draft resolution would have provided that

"The Security Council

"Declares that the existence and activities of the Franco régime in Spain have led to international friction and endangered international peace and security;

"Calls upon, in accordance with the authority vested in it under Articles 39 and 41 of the Charter, all Members of the United Nations who maintain diplomatic relations with the Franco Government to sever such relations immediately;"

4. The Sub-Committee on the Spanish Question, in its report 7/ of 31 May 1946, stated that "Before direct action under Article 41 or 42 can be ordered, the Charter requires that the Security Council must determine, under Article 39, the existence of a threat to the peace or a breach of the peace, or an act of aggression." The Sub-Committee further stated that, in its opinion, "the Security Council cannot, on the present evidence, make the determination required by Article 39", and that "Therefore, none of the series of enforcement measures set out in Articles 41 and 42 can at the present time be directed by the Security Council."

5. In the debate on the Sub-Committee's report, one representative referred to the "incorrect conclusion" that the Security Council had neither the right nor the jurisdiction to take decisions regarding the severance of diplomatic relations with the Franco régime and thus to act in conformity with Article 41. Representatives who maintained that the situation in Spain represented a threat to the peace within the meaning of Article 39 argued that a decision by the Council in the terms of the draft resolution submitted by Poland would be a measure appropriate to the maintenance of peace. Representatives who were of the opinion that the situation did not come within the meaning of Article 39 argued that, in the circumstances, the Council was not entitled to proceed to the adoption of any of the measures mentioned in Articles 41 and 42.

5/ For an account of a similar question in connexion with Article 40, see in this Repertory under Article 40, II, B. See also under Article 39, II, C, 2, for views of members of the Council on the relationship between Articles 39 and 41.

6/ S C, 1st yr., 1st Series, No. 2, 34th mtg., p. 167.

7/ S C, 1st yr., 1st Series, Special Suppl., rev. ed., p. 1, S/75, para. 18.

6. At the 47th meeting of the Council, the representative of Poland submitted a revised draft resolution 8/ from which the reference to Articles 39 and 41 had been deleted. Opposition to the revised text was expressed on the ground that the proposal still represented an attempt to have the Council take action under Chapter VII of the Charter, whereas the Sub-Committee had reported that the conditions for acting under Chapter VII did not exist in the Spanish situation. 9/

Decision

At the 48th meeting of the Security Council on 24 June 1946, the revised draft resolution was rejected 10/ by 7 votes to 4.

B. The question of recourse to measures specifically under Article 41 to secure compliance with decisions of the Security Council

7. Article 41 provides that "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions". In the discussion of a draft resolution, 11/ submitted by China and the United Kingdom, in connexion with the Palestine question, the question of recourse to measures specifically under Article 41 to secure compliance with the decisions of the Security Council arose.

8. The revised text 12/ of the draft resolution submitted at the 375th meeting on 29 October 1948, after referring to the resolutions of 15 July and 19 August 1948, read as follows:

"Having decided on 29 May that, if the truce was subsequently repudiated or violated by either party or by both, the situation in Palestine would be reconsidered with a view to action under Chapter VII of the Charter;

"Endorses the request communicated to the Government of Egypt and the Provisional Government of Israel by the Acting Mediator on 26 October (S/1058); and

"Calls upon them to withdraw their military forces to the positions they occupied on 14 October, with a view to the establishment of a permanent truce line; and

"Appoints a committee of the Council, consisting of the five permanent members together with Belgium and Colombia, to examine urgently and report to the Council on the measures which it would be appropriate to take under Article 41 of the Charter if either party or both should fail to comply with the preceding paragraph of this resolution within whatever time-limit the Acting Mediator may think it desirable to fix."

8/ S C, 1st yr., 1st Series, No. 2, 47th mtg., pp. 380 and 381.

9/ For texts of relevant statements, see S C, 1st yr., 1st Series, No. 2, 34th mtg.: Netherlands, pp. 174-177;

35th mtg.: United Kingdom, pp. 180-185;

44th mtg.: President (France), p. 322; Australia, p. 314; Poland, p. 323;

45th mtg.: USSR, pp. 336 and 337;

46th mtg.: Australia, pp. 349-357; United Kingdom, pp. 344-349.

10/ S C, 1st yr., 1st Series, No. 2, 48th mtg., p. 388.

11/ S C, 3rd yr., No. 122, 374th mtg., pp. 12 and 13, S/1059.

12/ S C, 3rd yr., Suppl. for Oct., p. 72, S/1059/Rev.2.

9. One of the sponsors of the draft resolution, after referring to the penultimate paragraph of the resolution 13/ of 29 May 1948, which envisaged the possibility of action under Chapter VII of the Charter in the event of the parties failing to implement that decision, stated that the time had come for the Council to examine the possibilities of action open to it if either party should unfortunately persist in defying the order of 26 October 1948 of the Acting Mediator. He hoped that the Council would proceed to show its determination to uphold the truce by taking certain preliminary steps in the direction of action under Chapter VII.
10. One representative questioned whether it would be appropriate to invoke Article 41 in circumstances in which the Council was not ordering the parties to do certain things, but merely endorsed a request addressed to them by the Acting Mediator. He said that he would prefer deletion of the reference to Article 41, and pointed out that the reference, in the preamble of the draft resolution, to the resolution of 29 May 1948 should be sufficient indication of the possibility that the Council might contemplate action under Chapter VII. It was pointed out in reply that if the Council endorsed the request of the Acting Mediator and made it its own and proceeded to call upon the parties to withdraw their forces to certain positions, it could contemplate or, at any rate, examine the possibility of stronger action.
11. The representative of the Provisional Government of Israel stated that the draft resolution asked his Government to accept "the technically impossible" and thus forced it "to incur the inevitable penalty of non-compliance". He contended that in the particular case under consideration there was no justification, even within the framework of the truce, for a special application of any Article of the Charter.
12. Another argument advanced in opposing the draft resolution was that its adoption would serve no useful purpose until all possible avenues for the implementation of the resolution 14/ already adopted had been explored. A new decision, particularly a decision to set up a committee, would mean that the programme outlined in the resolution of 19 October 1948 would be upset and that the conditions laid down in it, which might serve as the basis for further negotiations between the parties concerned, would be nullified, with the result that the question might again become complicated and confused.
13. A sub-committee of the Council, appointed at the 375th meeting to consider proposed amendments to the draft resolution, submitted its report 15/ at the 376th meeting on 4 November 1948. The report contained a revised draft resolution for consideration by the Council. The representative of the United States submitted several amendments 16/ to the draft resolution offered by the sub-committee, including one to replace the reference to Article 41 in the last paragraph by a reference to Chapter VII. In support of this amendment, he stated that it would allow the proposed committee to consider the situation in the light of Chapter VII as a whole and would not restrict it within the framework of Article 41.
14. Supporting the United States amendment, another representative stated that it was inadvisable to anticipate that the draft resolution, after its adoption, might not be implemented and to make reference to the terms of Article 41 from the outset, thus confining the action of the committee a priori to the terms of that Article. He would consider it logical that the proposed committee "should eventually take its stand on

13/ S C, 3rd yr., Suppl. for May, pp. 103 and 104, S/801.

14/ G A (IV), Suppl. No. 2, p. 43, S/1044. For texts of relevant statements, see S C, 3rd yr., No. 118, 367th mtg., pp. 29-37.

15/ S C, 3rd yr., Suppl. for Nov., p. 1, S/1064.

16/ S C, 3rd yr., No. 124, 376th mtg., pp. 2-4.

Chapter VII of the Charter, as that would simply be the application of a previous resolution of the Security Council." It was possible that the committee might decide, in the event of violation by the parties of the injunctions addressed to them, to take either provisional measures under Article 40 or the more severe measures provided for in the Charter. Therefore, if the reference to Article 41 was suppressed, the resolution would not lose any of its authority.

15. The representative of the Provisional Government of Israel, expressing his opposition to the draft resolution submitted by the sub-committee, stated that it appeared to his delegation to be inconsistent not only with the existing conditions, but also within itself and with the Charter. The last paragraph, which implicitly contemplated the application of sanctions, seemed to be in violation of the Charter. That paragraph proceeded on the assumption that non-compliance with provisional measures by a party to a dispute authorized the Council to apply the provisions of Chapter VII against that party. Such a theory, in the view of his delegation, was without foundation. Article 40 provided that the Council "shall duly take account of failure to comply with such provisional measures." Whatever that phrase meant, it did not mean that the Council might apply the provisions of Chapter VII in a case of non-compliance with provisional measures. The provisional measures under Article 40 were not ordered. The parties were called upon in the language of recommendation to accept them, and it seemed clear that only in the case of a threat to the peace, or act of aggression, might a consideration of the application of the provisions of Chapter VII be undertaken by the Security Council under the provisions of Article 39.

16. The representative of the Provisional Government of Israel went on to state that the application of the provisions of Chapter VII represented such an incisive interference in the life of a State that it could only be used in the most extraordinary and exceptional cases. The subject before the Council was not a breach of the peace, a threat to the peace, or an act of aggression -- nor was it even a report of continuing warfare. The subject was an anticipated or contingent violation of the Acting Mediator's instructions within the framework of the truce. The truce, however, was not peace. It was an incident of war and an interruption of hostilities. It seemed to him to be very far-fetched to attempt the application of sanctions for non-compliance with certain regulations which belonged to provisional measures concerning the conduct of a defensive war. 17/

Decision

At the 377th meeting on 4 November 1948, the Council adopted 18/ the draft resolution recommended in the report of the Sub-Committee, as amended by the representative of the United States. The amendment, in which reference to Chapter VII was substituted for reference to Article 41, was adopted by 8 votes to 1, with 2 abstentions. In view of the adoption of the amendment, the corresponding part of the draft resolution containing a reference to Article 41 was not put to the vote.

17/ For texts of relevant statements, see S C, 3rd yr.,
 No. 122, 374th mtg.: Canada, pp. 28 and 29; France, p. 37; Provisional Government of Israel, pp. 36 and 37; United Kingdom, pp. 11, 12 and 38;
 No. 123, 375th mtg.: China, pp. 15 and 16; France, pp. 3-6; Provisional Government of Israel, pp. 12-15; USSR, pp. 16-19;
 No. 124, 376th mtg.: China, pp. 9 and 10; France, pp. 7-9; Provisional Government of Israel, pp. 10-12 and 14-16; United States, pp. 2-6.

18/ S C, 3rd yr., No. 124, 377th mtg., pp. 38-43.

